DEC 22 1936
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 588

HENRY E. OPPENHEIMER,

Petitioner,

—against—

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD S. GREENBAUM,
Solicitor for Petitioner,
Henry E. Oppenheimer,
No. 285 Madison Avenue,
New York, N. Y.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Petition	1
Opinions of the Courts Below	2
Jurisdiction	3
Summary Statement of the Matters Involved	3
Statute Involved	9
Specification of Error	10
Questions Presented	10
Reasons Relied on for the Allowance of the Writ	11
Brief	13
Opinions in the Courts Below	13
Jurisdiction	13
POINT I—The decision herein, subordinating petitioner's judgment for fraud upon rescission of the sale of stock, is in conflict with the decisions of other Circuit Courts of Appeals. This Court should resolve the conflict	13
POINT II—The court below has decided an important question of Federal law which has not been, but should be, settled by this Court. The question was, indeed, expressly reserved by this Court in a leading case interpreting and applying the Federal shareholders' liability statute	20
POINT III—The decision below has construed the Federal statute as to National Bank shareholders' liability in a way probably untenable	21
Conclusion	27

TABLE OF CASES CITED:

Atwood v. *McKenzie-Waterhouse Co.*, 120 Wash. 214.. 24n

Bryan v. *Welch*, 74 F. (2d) 964, 970-1 (C. C. A. 10), *cert. den.*, 295 U. S. 748 23

PAGE

Burningham v. *Burke*, 67 Utah 90 20
B. V. Emery & Co. v. *Wilkinson*, 72 F. (2d) 10, 13 (C. C. A. 10) 22

Cawthon v. *Bancokentucky Co.*, 52 F. (2d) 850 (D. Ky.) 19
Chandler v. *Miller*, 172 Wash. 252 ..... 24n
Clark v. *Boston-Continental Nat. Bank*, 84 F. (2d) 605 (C. C. A. 1) 11, 16
Clark v. *Boston-Continental Nat. Bank*, 84 F. (2d) 607 (C. C. A. 1) 11, 16

Dox v. *R. E. Lomax Co.*, 29 Cal. App. 718 ..... 24n
Duffy v. *Treide*, 75 F. (2d) 17 (C. C. A. 4) 23

Florida Land & Imp. Co. v. *Merrill*, 52 Fed. 77 (C. C. A. 5) 18

Goess v. *A. D. H. Holding Corp.*, 85 F. (2d) 72 (C. C. A. 2) 21
Goess v. *Ehret*, 85 F. (2d) 109 (C. C. A. 2) 21
Goodin v. *Palace Store Co.*, 164 Wash. 625 ..... 24n

Hunsicker v. *Gilham*, 163 La. 651 ..... 24n

Independent V. & S. Co. v. *Iowa Mercantile Co.*, 189 Iowa 874 ..... 18, 24n

Jaskow v. *Harriman Nat. Bank*, 159 Misc. 39 21
Julian v. *Stewart*, 56 F. (2d) 32 (C. C. A. 5) 18, 26

Lantry v. *Wallace*, 182 U. S. 536; 97 Fed. 865 ..... 11, 19, 20
Litchfield Bank v. *Peck*, 29 Conn. 384 ..... 18, 24n, 26

MacNamee v. *Bankers' Union*, 25 F. (2d) 614 (C. C. A. 2) 18, 24n, 26
Marion Trust Co. v. *Blish*, 170 Ind. 686 19
Merrill v. *Florida Land & Imp. Co.*, 60 Fed. 17 (C. C. A. 5) 18
Morris Bros., In re, 293 Fed. 294 (C. C. A. 9) 18, 26

Newton Nat. Bank v. *Newbegin*, 74 Fed. 135 (C. C. A. 8) 19

Oppenheimer v. *Harriman National Bank*, 85 F. (2d) 582 (C. C. A. 2) 2, 13

PAGE

Page v. *Jones*, 7 F. (2d) 541, 544 (C. C. A. 8)..... 24

Recording Devices Co., In re, 1 F. (2d) 474 (D. Ohio). 19
Richardson v. *Olivier*, 105 Fed. 277, 280-1 (C. C. A. 5) 18, 23
Ryan v. *Mt. Vernon Nat. Bank*, 206 Fed. 452 (C. C. A. 2)..... 13
Ryan v. *Mt. Vernon Nat. Bank*, 224 Fed. 429, 430 (C. C. A. 2)..... 22

Salter v. *Williams*, 244 Fed. 126 (C. C. A. 3), *app. dism.*, 250 U. S. 653.....8, 11, 14, 14n, 17, 18, 23n, 24, 25
Salter v. *Williams*, 219 Fed. 1017 (D. N. J.)..... 23n
Scott v. *Armstrong*, 146 U. S. 499, 507..... 23
Singleton v. *Harriman Nat. Bank*, 152 Misc. 323, *aff'd*, 241 N. Y. App. Div. 857.....4n, 21
Stone v. *Walker*, 201 Ala. 130..... 24n

Williams v. *Green*, 23 F. (2d) 796 (C. C. A. 4).....18, 26
William B. Joyce & Co. v. *Eifert*, 56 Ind. App. 190..19, 24n

STATUTES CITED:

Judicial Code (28 U. S. C., Section 347 [a]):

Section 240(a) 3, 13

12 U. S. C.:

Section 63 .....8, 9, 10, 11, 18, 21, 24, 25
" 64 .....8, 9, 10, 11, 18, 21, 22, 24, 25

Supreme Court of the United States

OCTOBER TERM, 1936.

No.....

HENRY E. OPPENHEIMER,

Petitioner,

—against—

THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK and HENRY E. COOPER as Conservator, *etc.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

May it please the Court:

Henry E. Oppenheimer, by his solicitor, respectfully prays that a writ of *certiorari* issue to review the resettled judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled action at law on November 9, 1936 (R. 188).*

---

* A judgment was entered herein by the Circuit Court of Appeals on August 17, 1936 upon its opinion filed August 10, 1936. Thereafter rehearing was applied for by both the respondents and the petitioner, and was in each case denied (September 21, 1936; October 14, 1936). On August 26, 1936, the Circuit Court of Appeals filed its amended opinion (which is, however, printed under date of August 10, 1936), and on November 9, 1936 entered its resettled judgment thereon. The resettled judgment is the judgment here sought to be reviewed. Mandate has duly issued to the District Court, which has entered a judgment identical with that entered by the Circuit Court of Appeals.

Said resettled judgment of the Circuit Court of Appeals:

(1) reverses a judgment of the District Court for the Southern District of New York in favor of the respondents, Harriman National Bank and its Conservator (defendants below), entered upon an order directing a verdict for the respondents after cross motions at the trial for a directed verdict;

(2) orders that judgment be entered for the petitioner (plaintiff below) against the respondent Bank, which is now in receivership,* for the amount demanded in the complaint, *but that such judgment may be collected by the petitioner only after payment in full out of the assets of the receivership of all who were creditors of the Bank at the time it became insolvent.*

As will appear more particularly below, the error claimed is that petitioner's judgment should not have been so subordinated, but should have been given equal ranking with other unsecured creditors' claims.

Opinions of the Courts Below.

The District Court (Coxe, *D. J.*) did not file a formal opinion, but stated its reasons for directing a verdict in favor of the respondents at Record 63. The amended opinion of the Circuit Court of Appeals upon reversal (Swan, *C. J.*) is reported in 85 F. (2d) 582 (R. 157-60).

---

* The action was ordered dismissed as to the respondent Conservator "in as much as it appears that a receiver was appointed for said Bank during the pendency of said action" (R. 188).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C., Section 347 [a]). The resettled judgment of the Circuit Court of Appeals sought to be reviewed herein was entered on November 9, 1936.

Summary Statement of the Matters Involved.

The action is at law for damages upon an executed rescission of the sale to the petitioner of certain shares of stock of respondent Harriman National Bank. The complaint alleges that the petitioner was and still is a depositor in the respondent Bank; that as a result of fraudulent representations made by the Bank to the petitioner as a depositor, he was induced to and did purchase ten shares of Bank stock on November 1, 1930; that the purchase was made in reliance on false representation made by the Bank with intent to deceive the petitioner, and that as soon as the petitioner discovered the fraud he elected to and did rescind the transaction, giving notice thereof to both the Bank and its Conservator (who was appointed in March, 1933), and tendering back the stock. He sues for the price paid less proper offsets, joining the Bank and its Conservator as parties defendant.

The petitioner has paid the statutory assessment levied against him as a National Bank stockholder (without prejudice to the present action) and has in no respect challenged that assessment or sought repayment thereof.

The facts proved under the complaint, as well as the defenses interposed by the respondents, are fairly summarized in the following extract from the amended opinion of the Circuit Court of Appeals.

"The plaintiff, Henry E. Oppenheimer, was a depositor in the Harriman National Bank, of which Joseph W. Harriman was president and F. S. Williamson was a vice president. On October 28, 1930, Williamson called upon Oppenheimer, presenting a letter of introduction on bank stationery signed by Harriman. Relying upon statements made in the letter and oral statements made by Williamson, Oppenheimer was induced to purchase ten shares of stock of the bank at the price of $15,120. On November 1, he received from the bank a bill therefor which he paid by a check drawn upon his account in the bank and payable to its order. Another vice-president of the bank, Mr. Austin, acknowledged receipt of his check and sent him a stock certificate for the purchased shares. His check was marked 'Paid' and the bill was receipted. During 1931 and in January, 1932, Oppenheimer received dividends on the stock aggregating $525. He sold two shares in May, 1932, for the price of $2,408 and thereafter received a new certificate for his remaining eight shares. In the spring of 1933, when he saw a newspaper reference to the *Singleton* case,* he discovered that the statements which had induced his purchase were false and fraudulent. Thereupon, on May 6, 1933, he gave notice of rescission, tendered back the certificate, and demanded that his account in the bank be credited with the amount of his payment, less the sums received by him as dividends and from his sale of the two shares disposed of. The bank in the meantime had closed its doors and the defendant Cooper had been appointed its conservator. The plaintiff's demand for rescission being rejected, this action was instituted on May 31, 1933. It seeks judgment for

* [Court's footnote] *Singleton* v. *Harriman National Bank*, 152 Misc. 323, aff'd 241 N. Y. App. Div. 857.

$12,187 with interest from November 1, 1930. During pendency of the action, a receiver was appointed for the bank, but he has not become a party to this suit.

"The amended answer of the defendants, besides a general denial, sets up the affirmative defenses of ratification after knowledge of the fraud, and of laches. [These affirmative defenses were abandoned at the trial.] At the trial the defendants were allowed further to amend 'tentatively' by setting up that on and after March 4, 1933, the bank was insolvent and that debts incurred since November 1, 1930, cannot be paid out of its assets. The District Court reserved decision on whether this tentative amendment constituted a defense and never formally ruled upon it.

"The defendants' proof tended to show that the stock purchased by Oppenheimer was not owned by the bank but by its affiliate, Harriman Securities Corporation. The bank maintained in its bond department an account known as 'Harriman Securities Corporation Suspense Account,' in which were reflected purchases and sales of Harriman Bank stock made for the account of said affiliate. To the extent that the account was long of the stock it represented an indebtedness of the affiliate to the bank. Certificates of stock purchased for the suspense account were put in the name of one Kelly, not an employee of the bank, as nominee of the Securities Corporation. The ten shares sold to Oppenheimer stood in Kelly's name, and the suspense account was credited with the sum received by the bank from Oppenheimer, less $100. retained by the bank as its commission on the sale. It is conceded, however, that Oppenheimer had no knowledge of any transactions between the bank and its affiliate and believed that he was dealing with the bank as a principal in his purchase of the stock.

It is also conceded that a fraud was practised upon him by Harriman and Williamson,* the dispute as to this being only whether the bank is chargeable with their fraud.

"At the conclusion of the evidence both parties moved for a directed verdict. The District Judge granted the defendants' motion on the ground (1) that the bank was not enriched by the sale of the stock to Oppenheimer, and (2) that neither Harriman nor Williamson had actual or apparent authority to make the representations which induced his purchase. From the judgment entered pursuant to the directed verdict the plaintiff has appealed."

The Circuit Court of Appeals reversed the judgment, holding upon abundant evidence that Williamson and Harriman had apparent if not actual authority to make the sale and that the representations incidental to the sale were attributable to the Bank. This was so, said the court, "whether the bank, as a principal, sold its own stock, or, as an agent, sold

---

* The fraud referred to by the court consisted of the following: The market for Harriman National Bank stock had been artificially rigged over a considerable period of time by regular purchases of the stock (usually at the close of each business day) by the Bank, which placed the stock so acquired into the "suspense account". For about two years these final bids, which were relayed from over-the-counter dealers to certain dealers' associations and thence to the newspapers, reflected almost exclusively sales by the dealers to the Bank. There was no real market; the public quotations were fictitious; they concealed a continuous and drastic decline in real value.

As part of the scheme it became necessary to unload the stock which had been so acquired. This was done by inducing certain depositors to buy Bank stock by reference to the deceptive public market quotations and by other fraudulent representations. Among other things Williamson referred the petitioner to the quotations and stated that the stock came "from an estate". He knew that the market was rigged and he knew that the stock did not come from an estate but from the "suspense account".

Further description of the fraud is unnecessary here because, as stated by the Circuit Court of Appeals, the respondents frankly conceded that a fraud was practiced upon the petitioner (R. 38-9).

stock owned by the Securities Corporation. * * * In either event, the plaintiff dealt only with the bank; he had no knowledge that any third party was involved. If the bank sold stock belonging to its affiliate, as the defendants contend, it sold for an undisclosed principal and was itself a party to the contract." Therefore the petitioner was held entitled to a judgment for the amount demanded in the complaint. So far the Circuit Court of Appeals was plainly correct.

Coming, however, to the precise question sought to be reviewed herein, namely, the question of the ranking of petitioner's judgment as a claim against the Bank in receivership, the court ruled that, the demand for rescission having been made after the Bank became insolvent (insolvency conceded as of March 3, 1933; demand for rescission on May 6, 1933), the judgment must be subordinated to the claims of all who were creditors of the Bank at the time it became insolvent. The resettled judgment accordingly reads in part: "Ordered, * * * that judgment for the amount demanded in the complaint be entered against the defendant * * * Bank * * * *collectible out of the assets of the receivership after payment in full of all who were creditors when the said bank became insolvent.*"

In sum, therefore, *the Circuit Court of Appeals has held that a claim for fraud as to the sale of Bank stock, asserted through rescission of the sale after the insolvency of the Bank, must be subordinated to the claims of all other creditors.* It is to be noted that this cause does *not* involve fraud in a subscription to an *original issue* of Bank stock, but in a *resale* of stock *previously issued and paid-up,* and (in respondents' own view of the facts) actually owned

and held by a third party prior to the fraudulent sale. The court's holding on the question here sought to be reviewed is clear-cut; there is no complicating feature in the case such as laches or estoppel—which, indeed, are specifically negatived by the opinion below.

The court recognized that "such a [subordinated] judgment will very likely have only an academic value." Moreover, as indicated in the court's own opinion, its decision herein is contrary to the decision of the Circuit Court of Appeals for the Third Circuit in *Salter* v. *Williams,* 244 Fed. 126 (*app. dism.,* 250 U. S. 653). The court nevertheless felt that the result was compelled "by necessary implication" from the terms of the Federal statute as to National Bank shareholders' liability (12 U. S. C., Sections 63 and 64). Following is the court's reasoning:

> "Under the federal statute as to shareholders' liability (12 U. S. C. A. §63), it is well settled that a defrauded shareholder, who had not rescinded at the time of the bank's insolvency, cannot escape payment of an assessment made by the comptroller to meet the deficiency of assets available for the payment of all who were creditors when the bank failed. * * * By necessary implication the statute renders not only the fund raised by assessment, but also all of the insolvent bank's assets security for the payment of those who were creditors at the time of the bank's failure. Obviously, one who is liable to such creditors as a stockholder for assessment can neither reduce the amount he has paid as assessment nor come in to share assets he is bound to leave to the prior satisfaction of those creditors."

We repeat and emphasize that the petitioner has actually paid the stock assessment levied against him.

Statute Involved.

As above-noted, the Circuit Court of Appeals deemed relevant the Federal statute as to National Bank shareholders' liability (12 U. S. C., Sections 63 and 64), which provides as follows:

> "§63. *Individual liability of shareholders.* The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *
>
> "§64. *Individual liability of shareholders; transfer of shares.* The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure."

Specification of Error.

Petitioner contends that his judgment for fraud should have been held entitled to rank on a parity with other unsecured creditors' claims against the assets of the receivership. The net effect of such a decision will be to reinstate petitioner's deposit balance in the Bank to the extent of the withdrawal from his account used to make the purchase, and allow him to assert a general claim therefor in the receivership.

Questions Presented.

1. Did the Circuit Court of Appeals err in holding that a claim for damages for fraud in the sale of Bank stock, asserted through rescission after the insolvency of the Bank, must be subordinated to the claims of all who were creditors of the Bank at the time it became insolvent? Or should such a claim, in the absence of laches or estoppel, have been held entitled to rank on a parity with other unsecured creditors' claims?

2. Assuming without conceding that such subordination is proper where the sale is of an *original issue* of Bank stock, is such subordination proper where, as here, the stock sold had been *previously issued and fully paid-up, and, on respondents' own view of the facts, was actually owned and held by a third party, having been sold by the Bank as agent?*

3. Did the Circuit Court err in holding that such subordination was compelled by "necessary implication" from the terms of the Federal statute as to National Bank shareholders' liability (12 U. S. C., Sections 63 and 64)?

Reasons Relied on for the Allowance of the Writ.

I. *The Circuit Court of Appeals for the Second Circuit has rendered a decision herein in conflict with the decisions of other Circuit Courts of Appeals on the same matter.*—The court's amended opinion expressly indicates that the ruling herein subordinating the petitioner's judgment is contrary to the decision in *Salter* v. *Williams,* 244 Fed. 126 (C. C. A. 3), *app. dism.,* 250 U. S. 653. It is also contrary to the decisions in *Clark* v. *Boston-Continental Nat. Bank,* 84 F. (2d) 605 (C. C. A. 1), and *Same* v. *Same,* 84 F. (2d) 607 (C. C. A. 1), handed down June 25, 1936. There are several other conflicting decisions of the Circuit Courts of Appeals on this matter. (Brief, Point I, *infra.*)

II. *The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.*—The question raised herein was expressly reserved by this Court in *Lantry* v. *Wallace,* 182 U. S. 536, 555, and was recognized to be an important question. *Id.,* p. 547. It deserves a final, authoritative decision. (Brief, Point II, *infra.*)

III. *The Circuit Court of Appeals for the Second Circuit has decided an important question of the construction of a Federal statute in a way probably untenable.*—We shall attempt to show that the court misinterpreted and misapplied 12 U. S. C., Sections 63 and 64. (Brief, Point III, *infra.*)

WHEREFORE your petitioner respectfully prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit to the end

that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals modified.

Dated, New York, N. Y., December 7, 1936.

EDWARD S. GREENBAUM,
Solicitor for Petitioner,
Henry E. Oppenheimer.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions in the Courts Below.

The District Court (Coxe, *D. J.*) did not file a formal opinion, but expressed the reasons for its ruling at Record 63. The amended opinion of the Circuit Court of Appeals (Swan, *C. J.*) is reported in 85 F. (2d) 582 (R. 157-60).

Jurisdiction.

The resettled judgment of the Circuit Court of Appeals was entered on November 9, 1936 (R. 188). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C., Section 347 [a]).

POINT I.

The decision herein, subordinating petitioner's judgment for fraud upon rescission of the sale of stock, is in conflict with the decisions of other Circuit Courts of Appeals. This Court should resolve the conflict.

It is now settled law, as recognized by the court below, that the insolvency of a National Bank does not *per se* prevent rescission of the sale of its stock on the ground of fraud. See, *e. g., Ryan* v. *Mt. Vernon Nat. Bank,* 206 Fed. 452 (C. C. A. 2). There is, however, a decided conflict of authority on the question whether the judgment for fraud may rank on a parity with other unsecured creditors' claims against the assets of the insolvent Bank, or must be subordinated to such claims. This is the precise issue at bar.

The amended opinion of the court below, in refusing to follow *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *app. dism.*, 250 U. S. 653,* expressly recognizes that such a conflict exists. Analysis of the authorities indicates that the First, Fourth and Fifth Circuits side with the *Salter* case, while the decision herein finds support in the Ninth Circuit. In addition there are some courts, both Federal and State, in which the question has been adverted to, but not clearly defined or decided.

Salter v. *Williams* (C. C. A. 3), *supra*, is identical on its facts with the cause at bar. One Young was indebted to the National Bank; the Comptroller directed the Bank to reduce the loan. As Young owned certain shares of Bank stock, it was proposed that a purchaser be found for them and the sale price be credited on the loan. The Bank president made false representations to the plaintiff, as a result of which the plaintiff bought the stock, the proceeds being applied to Young's loan—in much the same way as the proceeds of the sale to the petitioner herein were used to reduce the indebtedness of the affiliate to the respondent Bank. After insolvency and receivership of the Bank, suit was brought to rescind the transaction. The court held that the Bank was chargeable with the fraud of its president, and then inquired whether the judgment was entitled to share equally with the claims of other unsecured creditors. Noting that the plaintiff had satisfied his liability under the shareholders' assessment statute, the court held that, *qua* creditor to the extent of his

* The brief *per curiam* opinion of this Court dismissing the appeal in *Salter* v. *Williams* indicates that the reason for dismissal was that *certiorari*, rather than appeal, was the proper mode of review.

judgment, the plaintiff was entitled to parity with other creditors (p. 130):

> "That Salter could have enforced a right of rescission against the bank (if such he had) before the appointment of a receiver is unquestioned. If so, it would be only because the rights of creditors were then no greater than his right of rescission. If creditors' rights in the capital were no greater than Salter's before the appointment of a receiver, they surely are no greater after. The rights of both with respect to capital are fixed by law, not by a change from solvency to insolvency of the bank, and by the consequent appointment of a receiver.
>
> *"Salter's right to rescission was fixed by the fraud of the bank when the fraud was practiced. That was before receivership. He therefore approaches the receiver like an ordinary creditor whose claim was contracted before receivership, with a like right to redress out of the bank's funds in the hands of the receiver."* (Italics ours.)

The court's discussion of the effect of the shareholders' liability statute is especially noteworthy, as it acutely refutes the reasoning of Judge Swan below (pp. 129-30):

> "* * * It [the receiver's contention] is based upon the theory that the stock of a bank represents its capital; that creditors have a right to look to its capital for the payment of its debts; that their rights are fixed by the appointment of a receiver, which preserves the capital for them undisturbed by stockholders seeking to get from under the legal liability of their stock ownership. In support of this very general proposition no authorities are cited. The argument in support of it is made by analogy to certain un-

disputed principles affecting the liability of stockholders and the rights of creditors upon insolvency of a national bank and the appointment of a receiver. These apply to the double liability of a stockholder of a national bank under section 5151, R. S., and to the liability of a subscriber to stock in a national bank to complete his contract of subscription. *Scott* v. *Deweese,* 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822; *Scott* v. *Abbott,* 160 Fed. 573, 87 C. C. A. 475; *Lyons* v. *Westwater,* 181 Fed. 681, 104 C. C. A. 663; *Westwater* v. *Lyons,* 193 Fed. 817, 113 C. C. A. 617. It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met his liability under section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible."

Very recently, the Circuit Court of Appeals for the First Circuit, in *Clark* v. *Boston-Continental National Bank,* 84 F. (2d) 605, and *Same* v. *Same,* 84

F. (2d) 607, both decided June 25, 1936, adhered to the rule laid down in the *Salter* case. Following insolvency of the National Bank and the appointment of a receiver, Clark brought two actions in fraud and deceit against the Bank, charging that the Bank president, acting for the Bank, had made certain false and fraudulent representations as a result of which Clark was induced to purchase Bank stock (and also to lend money upon the security of Bank stock owned by third parties). As in the cause at bar, the purpose of the fraud was to rig the price of Bank stock at an artificialy high level in excess of true value. "Two questions", said the court, "are raised in this case: (1) whether a corporation may be held for the false representations made by its directors or under their authority; and (2) *whether, if it may be held liable therefor, the plaintiffs, as judgment creditors of an insolvent bank, having paid the assessments levied against them as stockholders, may participate ratably with other creditors in a distribution of the assets of the bank in the hands of the receiver.*" The court answered both questions in the affirmative. On the second question, which is exactly the one here in issue, the court stated (p. 607):

> "As to the second question it appears from the allegations of the declaration that the plaintiffs' claims were fixed liabilities of the bank at the time it was declared insolvent, and that the plaintiffs have paid the assessments levied against them as stockholders. In this situation we see no reason why the plaintiffs should not participate ratably with other creditors in the distribution of the bank's assets in the hands of the receiver. It was so held in *Salter* v. *Williams* (C. C. A.) 244 F. 126."

In *Williams* v. *Green*, 23 F. (2d) 796 (C. C. A. 4), the *Salter* case is also approved and followed, the possible distinction between rescission of a subscription to an original issuance of National Bank stock, and rescission of a sale of Bank stock previously issued and paid-up, being carefully suggested.

The Fifth Circuit in *Florida Land & Imp. Co.* v. *Merrill*, 52 Fed. 77; *Merrill* v. *Florida Land & Imp. Co.*, 60 Fed. 17, went so far as to permit the defrauded purchaser of stock to reclaim in specie from the insolvent National Bank the consideration paid (by means of a vendor's lien on land conveyed), thus according with the usual rule that a defrauded party may reclaim the swindled property or fund from all but a *bona fide* purchaser for value without notice, and that a Bank receiver is not, in contemplation of law, a purchaser for value without notice. In short, the plaintiff, although a stockholder, was held entitled, *qua* creditor, to assert normal rights in the latter capacity.

The *Merrill* cases are explained and approved in *Julian* v. *Stewart*, 56 F. (2d) 32 (C. C. A. 5). See also: *Richardson* v. *Olivier*, 105 Fed. 277, 280-1 (C. C. A. 5); *Independent V. & S. Co.* v. *Iowa Mercantile Co.*, 189 Iowa 874; *Litchfield Bank* v. *Peck*, 29 Conn. 384.

The decision of the court below, admittedly in conflict with the *Salter* case, rests on a purported "implication" from the terms of the National Bank shareholders' liability statute (12 U. S. C., Sections 63 and 64). The validity of this implication is treated below, Point III. Judge Swan also cites his own *dictum* in *MacNamee* v. *Bankers' Union*, 25 F. (2d) 614 (C. C. A. 2), which in turn rests on *In re Morris Bros.*,

293 Fed. 294 (C. C. A. 9). The latter is, however, distinguishable on the ground, among others (see Point III), that the opinion speaks indiscriminately of "laches" and depends to some extent on a statute peculiar to Oregon. Judge Swan also cites *William B. Joyce & Co.* v. *Eifert,* 56 Ind. App. 190, which appears to have no bearing on the question of subordination. *Cf. Marion Trust Co.* v. *Blish,* 170 Ind. 686.

The position of the Sixth (see *Cawthon* v. *Bancokentucky Co.,* 52 F. [2d] 850 [D. Ky.]; *In re Recording Devices Co.,* 1 F. [2d] 474 [D. Ohio]) and Eighth Circuits (see *Newton Nat. Bank* v. *Newbegin,* 74 Fed. 135 [C. C. A. 8]; *Lantry* v. *Wallace,* 97 Fed. 865 [C. C. A. 8], *aff'd,* 182 U. S. 536) may fairly be said to be equivocal.

Beyond these authorities, there are several cases in which the question is touched on but not clearly defined. These derive from vague use of the words "laches" and "estoppel". It is of course clear law that a defrauded Bank stockholder (just as any defrauded party) must exercise all reasonable diligence in discovering the fraud and must act with dispatch in rescinding the transaction, else he may be met with the defense of laches or estoppel by ratification. Some opinions, however, placing an unnatural meaning on this doctrine, speak of the incurring by the Bank of liabilities following the fraudulent sale, as in itself a ground of laches or estoppel. See, *e. g., Newton Nat. Bank* v. *Newbegin,* 74 Fed. 135, 140 (C. C. A. 8), *supra,* and cases citing this case. This is not made the sole ground of decision; but the language is on the books and bedevils thought on the question. If the language were taken literally it might result in depriving the defrauded stockholder of any judgment whatever, in cases where debts were

incurred by the Bank after the sale and before insolvency. It might, on the other hand, result in subordinating the judgment only to those claims which arose during that period. *Cf. Burningham* v. *Burke*, 67 Utah 90. The court below took a third tack, subordinating the judgment to the claims of *all* who were creditors at the date of insolvency.

In this condition of the authorities, it seems appropriate and necessary that this Court assume jurisdiction and render a decision herein settling the question.

POINT II.

The court below has decided an important question of Federal law which has not been, but should be, settled by this Court. The question was, indeed, expressly reserved by this Court in a leading case interpreting and applying the Federal shareholders' liability statute.

In the course of its opinion in *Lantry* v. *Wallace*, 182 U. S. 536, relating to the claimed right of a defrauded shareholder, who had not rescinded the purchase of stock at the time of the Bank's insolvency, to escape payment of an assessment, this Court adverted to and reserved the question now at bar. Assuming *arguendo* that the shareholder could recover a judgment for the fraud, the Court left open for future decision whether such a judgment would rank equally with the claims of other creditors (particularly in the proceeds of the stock assessment). Said this Court (p. 555):

> "* * * Whether, if the defendant [shareholder] claimed a judgment against the bank or its of-

ficers for the alleged fraud or deceit of the latter officers, he could participate in the distribution of the proceeds of the stock assessment until all the contract obligations of the bank had been met, was not decided by the Circuit Court of Appeals. That question was wisely reserved for decision when it should arise and become necessary to be decided. * * *"

The question thus reserved is an important one (see 182 U. S., at p. 547). The cause at bar furnishes the occasion for a clear and authoritative decision thereof.

The problem appears to have given rise to considerable doubt in the receivership of the respondent Bank (see, *e. g.*, *Singleton* v. *Harriman Nat. Bank*, 152 Misc. 323, *aff'd*, 241 N. Y. App. Div. 857; *Jaskow* v. *Same*, 159 Misc. 39; *Goess* v. *Ehret*, 85 F. [2d] 109 [C. C. A. 2]; *cf. Goess* v. *A. D. H. Holding Corp.*, 85 F. [2d] 72 [C. C. A. 2]), and is doubtless significant in the administration of National Bank and other receiverships generally.

POINT III.

The decision below has construed the Federal statute as to National Bank shareholders' liability in a way probably untenable.

The opinion below purports to rest on 12 U. S. C., Section 63 (and Section 64). All this statute says is that National Bank shareholders shall be held responsible "for all contracts, debts, and engagements" of the Bank, "each to the amount of his stock therein, at the par value thereof in addition to the amount

invested in such stock". The court below held that "by necessary implication" the statute subordinates a claim for fraud as to the sale of stock, asserted through rescission after insolvency of the Bank, to other creditors' claims. Surely an extraordinary amount of prestidigitation is necessary in order to draw any such implication from the bare words of the statute.

(A) The court's reasoning is as follows: Under the statute it has been held that a defrauded stockholder may not, through rescission after the Bank's insolvency, escape payment of the assessment (citing cases in which defrauded stockholders were not permitted to defend on the ground of fraud *in suits against them to collect the assessment*); "by necessary implication" the statute renders not only the fund raised by the assessment but also all of the insolvent Bank's assets security for those who were creditors at the time of the Bank's failure; *ergo,* one who is liable as a stockholder for assessment "can neither reduce the amount he has paid as assessment nor come in to share assets he is bound to leave to the prior satisfaction of those creditors".

As to the liability of a defrauded stockholder for the assessment, the court is plainly correct. That result follows from the terms of the statute: "stockholder" means stockholder at the date of insolvency (see Section 64); at least where the fraud does not render the sale void but merely voidable, the stockholder *is* such when the Bank fails and is therefore obliged to make good the assessment. See *Ryan* v. *Mt. Vernon Nat. Bank,* 224 Fed. 429, 430 (C. C. A. 2); *B. V. Emery & Co.* v. *Wilkinson,* 72 F. (2d) 10, 13 (C. C. A. 10). But these cases are wholly inapplicable here, since the petitioner has in fact paid

the assessment levied against him and has never disputed that liability.*

The crux of the court's reasoning, however, is that "by necessary implication" both the fund raised by assessment and all the assets of the Bank at the date of insolvency are "security for the payment of *those who were creditors at the time of the bank's failure.*" As a general proposition (although certainly not as an implication from the statute) this may be conceded; the trouble is that the words "creditors at the time of the bank's failure" conceal an ambiguity. *Why is not a defrauded stockholder a "creditor at the time of the bank's failure" to the extent of the fraud?* It is agreed that if the subject matter of the fraudulent sale was not stock, but some other chattel, the fraud-claimant would be entitled to share *pari passu* in the assets of the receivership even if he asserted his claim through rescission after insolvency of the Bank. See *Scott* v. *Armstrong,* 146 U. S. 499, 507. *And it would make no difference that the claimant happened also to be a stockholder.* As was said in *Richardson* v. *Olivier,* 105 Fed. 277, 280 (C. C. A. 5): "The shareholder who is a creditor occupies a dual relation to the bank, and his liabilities and duties in one relation should not embarrass him in the enforcement of his rights in the other." See also: *Duffy* v. *Treide,* 75 F. (2d) 17 (C. C. A. 4); *Bryan* v. *Welch,* 74 F. (2d) 964, 970-1 (C. C. A. 10), *cert. den.,* 295 U. S. 748. On principle, the case is not altered simply because the subject matter of the

* The inapplicability of these cases is graphically shown by the fact that the stockholder in *Salter* v. *Williams,* 244 Fed. 126 (C. C. A. 3), *supra,* had previously sought to enjoin a suit against him to enforce the stock assessment; the court dismissed his bill. *Salter* v. *Williams,* 219 Fed. 1017 (D. N. J.). Having paid the assessment, he rescinded the sale and, as we have seen, was held entitled to share ratably with other creditors to the extent of his judgment for the fraud.

fraudulent sale was Bank stock; as stockholder the petitioner must pay an assessment, because the statute says so; as creditor in virtue of the fraud practiced upon him, the petitioner is entitled to all the rights of an unsecured creditor, and the statute says nothing to the contrary. Further discussion of this point would be supererogative in view of the trenchant observations of Judge Woolley in *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *supra*, quoted at page 15, *supra*.

It appears, therefore, that far from being a "necessary implication" from the terms of the statute, the decision herein represents a wholly unwarranted inference therefrom. If allowed to stand, the decision will tend to impose a curious additional disability on stockholders of National Banks which the Congress nowhere directed to be imposed. As it has been repeatedly recognized that the liability of 12 U. S. C., Sections 63 and 64, is purely a statutory liability (*Page* v. *Jones*, 7 F. [2d] 541, 544 [C. C. A. 8]), something more than a vague solicitude for creditors-who-are-not-also-stockholders (as distinguished from creditors-who-happen-also-to-be-stockholders) is needed before a disability is imposed beyond the plain terms of those Sections.*

---

* The court below was compelled to rest heavily on a supposed implication from these Sections apparently because no clear support can be found for its decision at common law. The *MacNamee* case (25 F. [2d] 614 [C. C. A. 2]), cited by the court, does not involve a National Bank, but it is at best a *dictum* pronounced by the same court. *William B. Joyce & Co.* v. *Eifert*, 56 Ind. App. 190, also cited, does not involve a National Bank, but is by not means persuasive for the decision herein. See, *contra* the *dictum* of the *MacNamee* case, at common law: *Independent V. & S. Co.* v. *Iowa Mercantile Co.*, 189 Iowa 874; *Litchfield Bank* v. *Peck*, 29 Conn. 384. The question has several times been adverted to and reserved at common law. *Hunsicker* v. *Gilham*, 163 La. 651; *Atwood* v. *McKenzie-Waterhouse Co.*, 120 Wash. 214, *cf. Goodin* v. *Palace Store Co.*, 164 Wash. 625, *Chandler* v. *Miller*, 172 Wash. 252; *Dox* v. *R. E. Lomax Co.*, 29 Cal. App. 718; *Stone* v. *Walker*, 201 Ala. 130.

(B) The court ignored a vital distinction, namely, the distinction between a claim for fraud arising from an *original subscription* to National Bank stock, and a claim for fraud arising from a *resale of previously issued and paid-in* Bank stock (as here).

It may be said that parties who do business with a National Bank are justified in relying on two things: (1) that the stock list represents paid-in shares, constituting the initial capital of the Bank; (2) that each such paid-in share is liable for assessment. The effect of allowing the petitioner herein to share equally with other creditors in the assets of the Bank cannot defeat either of these expectations. As to the second —liability for assessment—the petitioner has actually made good. As to the first, the shares were fully paid-in long before the controversy arose.

There might conceivably be colorable ground for the lower court's decision if the rescinded contract herein was an original subscription to Bank stock, since in that event the effect of permitting the petitioner to share equally would, arguably, be a diminution of the initial capital as against other creditors. Even so, the effect would be remote and certainly not interdicted by 12 U. S. C., Sections 63 and 64. But that argument is unavailable where, as here, the fraud related to a sale of stock previously issued and paid-in. This point is admirably presented in *Salter* v. *Williams*, 244 Fed. 126 (C. C. A. 3), *supra*:

> "It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met

his liability under section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible."

The distinction between a fraud claim arising from an original subscription, and a fraud claim arising from subsequent resale of paid-in shares, is also observed in *Williams* v. *Green,* 23 F. (2d) 796 (C. C. A. 4), *supra; Julian* v. *Stewart,* 56 F. (2d) 32 (C. C. A. 5), *supra; cf. Litchfield Bank* v. *Peck,* 29 Conn. 384 387, *supra.*

It is interesting to note that the case relied on in the court's opinion (*MacNamee* v. *Bankers' Union,* 25 F. (2d) 614 [C. C. A. 2], *supra,* which rests on a similar case, *In re Morris Bros.,* 293 Fed. 294 [C. C. A. 9], *supra*), is an instance of fraud inducing an original subscription. On close analysis it lends no support to the decision herein.

Indeed, not only were the shares sold to the petitioner previously issued and fully paid-in, but, on respondents' own view of the facts, *they were owned and held by a third party (the securities affiliate)*

prior to the sale, the Bank acting merely as an agent or "broker" in the sale. So far as the Bank and its creditors are concerned, the case is the same as if a bond or some other chattel, owned by a third party, was fraudulently sold by the Bank as agent. There is no more ground for depriving petitioner of equal treatment herein than there would be if the claim arose out of a tort wholly unrelated to Bank stock.

CONCLUSION.

For the foregoing reasons your petitioner, by his solicitor, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals modified.

EDWARD S. GREENBAUM,
Solicitor for Petitioner, Henry E. Oppenheimer.